DOCUMENT RESUME

ED 172 298 CS 502 559

AUTHOR Kelly, Margie
TITLE The Supreme Court's Search Ruling.
INSTITUTION Freedom of Information Center, Columbia, Mo.
REPORT NO FOI-403
PUB DATE Apr 79
NOTE 8p.; References may not reproduce well due to small type

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Civil Liberties; Courts; *Freedom of Speech; *Journalism; Legal Problems; News Media; Newspapers; Police Action; Press Opinion; *Privacy; *Search and Seizure; *Supreme Court Litigation
IDENTIFIERS Zurcher v the Stanford Daily

ABSTRACT

The 1971 police search of a newspaper office led to the United States Supreme Court's "Zurcher v The Stanford Daily" decision that newspaper offices can permissibly be searched if it is believed that they contain materials that relate to an ongoing criminal investigation. This decision has been viewed by the press as an attack on First Amendment protections, as a threat to the confidentiality of sources, as an invitation to police to use newsrooms as sources of information for investigations, and as a threat to the newspaper's role as watchdog on government and law enforcement. Since that decision, 12 to 15 searches have been conducted, lasting as long as 20 hours. Specific guidelines for newspaper offices to mitigate the effects of police searches include the following: insist that the warrant be presented to the editor in charge; summon an attorney and stall for time; understand the specific terms of the warrant; insist that police officers restrict themselves to precisely what is sought in the warrant; keep confidential materials in a safe or at home; use code names for sources; refrain from discarding notes; destroy unprinted photos immediately after running stories; cover the newsroom incident as a news story with photos; and insist on receipts for all items taken. (DF)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
Freedom of Information Center
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

ED172298

SCHOOL OF JOURNALISM, UNIVERSITY OF MISSOURI AT COLUMBIA
APRIL, 1979

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

FREEDOM OF INFORMATION CENTER REPORT NO. 403

THE SUPREME COURT'S SEARCH RULING

This report was written by Margie Kelly, an M.A. candidate at the University of Missouri School of Journalism.

It could have been a scene straight from the turbulent '60s, this confrontation between students and police. But the police search of the Stanford **Daily** rapidly became more than another campus clash, as into the fray came the considerable forces of the journalistic community and the more considerable power of the nation's highest court. The result: a Supreme Court ruling that police searches of newspaper offices are not an infringement of the First Amendment.

The wave of reaction that swept through the press after the court's May 1978 decision was profound. "I don't think anyone is hysterical to view it as a first step toward a police state," said Tom Winship, editor of the Boston **Globe**.[1] "At the risk of being accused of overreacting, I think the press should overreact," said James B. King, executive editor of the Seattle **Times**.[2]

As journalists lambasted the decision, newspapers began outlining defense policies and legislators began writing laws. The furor has not run its full course yet, and it may be some time before it does. But enough time has now elapsed — nearly a year — to begin to gain some perspective on the **Zurcher v. The Stanford Daily** decision. In seeking that perspective, the beginning seems a very good place to start.

A Student Newspaper, the Police, and the Supreme Court

On April 9, 1971, some 60 persons staged a demonstration at the Stanford University Hospital, protesting the firing of a hospital employee. When 175 police officers were dispatched to the scene, a riot ensued, and about 40 officers and demonstrators were injured. Photos of the skirmish were published in the student newspaper, the Stanford **Daily**, two days later, and the following day officers appeared with a warrant to search for photographs or negatives that might reveal the identity of demonstrators who had injured police officers. The warrant contained no indication that members of the **Daily** staff were involved in unlawful acts.[3]

In what is believed to be the first search of a newspaper ever conducted, four officers searched the **Daily**'s photographic laboratories, filing cabinets, desks and wastepaper baskets, and they had opportunity to read notes and correspondence. They did not, however, open locked drawers or rooms.[4] In their 15-minute search, the officers found only the photos that already had been published, presumably because the **Daily** had a policy of destroying unpublished photographic evidence that might incriminate someone. No materials were removed from the office.[5]

The newspaper went to court to protest the search, and in October 1972 District Judge Robert F. Peckham ruled in its favor. He said that "in all but a few instances," a subpoena is the required method of obtaining material from one not suspected of a crime — known as a "third party." And where that third party is a newspaper, the judge said the First Amendment requires that search warrants

> should be permitted only in the rare circumstances where there was a **clear showing** that 1) important materials will be destroyed or removed from the jurisdiction; **and** 2) a restraining order would be futile. To stop short of this standard would be to sneer at all the First Amendment has come to represent in our society.[6]

The decision was unanimously upheld by a three-judge panel of the 9th Circuit Court of Appeals.

Ruling against the Stanford **Daily** in a 5-3 vote,[7] the Supreme Court termed the district court ruling a "sweeping revision of the Fourth Amendment." The terms of that amendment, set forth in the majority opinion written by Justice Byron White, are as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[8]

At issue in the case, White wrote, is how this amendment is to be applied to the third-party search. Are such searches unreasonable? And are they particularly unreasonable when First Amendment issues of freedom of the press are involved? The court said no on both counts. As White wrote:

> The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the

Summary: While some have termed the Supreme Court's search ruling a "constitutional outrage," others say the press is overreacting. Both sides of the issue are explored in this report, which looks at how search warrants might affect the press and other third parties, what legislation has been proposed, and how newspapers might protect themselves.

C SSD2 859

> specific "things" to be searched for and seized are located on the property to which entry is sought.[9]

The state's interest in enforcing the law is the same, White said, whether the third-party occupant is suspect or not.

As for the First Amendment issues, the court said it was enough to insist the courts apply warrant requirements with "particular exactitude" where media searches are involved.

> Properly administered, the preconditions for a warrant — probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness — should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.[10]

The court was not convinced, White wrote, that search warrants would interfere with the timely publication of a newspaper or cause confidential sources to dry up. Noting the few instances of newspaper searches in recent years, he concluded the reality "hardly suggests abuse." And, he added cryptically, the press "is not easily intimidated — nor should it be."[11]

Affirming that the court would not reinterpret the Fourth Amendment to impose a "general constitutional barrier" against newspaper searches, White noted that legislative barriers could be built.[12]

In an eloquent dissent, Justice Potter Stewart based his objections primarily on the First Amendment. "It seems to me self-evident," he wrote, "that police searches of newspaper offices burden the freedom of the press." Physical disruption is the most obvious injury, he said, but a more serious burden is the possibility that confidential sources will be endangered.

> It requires no blind leap of faith to understand that a person who gives information to a journalist only on condition that his identity will not be revealed will be less likely to give that information if he knows that, despite the journalist's assurance, his identity may in fact be disclosed.[13]

Justice John P. Stevens' separate dissent was less concerned with First Amendment issues than with the general issue of third-party searches. In one crucial and frequently quoted passage he said:

> Countless law abiding citizens — doctors, lawyers, merchants, customers, bystanders — may have documents in their possession that relate to an ongoing criminal investigation. The consequences of subjecting this large category of persons to unannounced police searches are extremely serious.[14]

The First Amendment Bandwagon

In the wake of the Stanford decision, the press leaped to their typewriters with First Amendment banners flying. "A staggering blow to freedom of the press," came (St. Louis **Post-Dispatch**, 6-4-78) the cry — "a constitutional outrage." The alarm that ran through the media was indeed severe, as can be gauged by the headlines that appeared on articles and editorials in the days immediately following the May 31 decision. "A blow to privacy," blared the Washington **Star** (6-10-78). "Hallmark Of A Police State," cried the St. Louis **Post-Dispatch** (6-8-78). "High Court Ignorance Astonishing," said the Kansas City **Times** (6-8-78). Beyond what was said in the media, there were more concrete indications that the shock waves were traveling far. "I've been getting hundreds of calls from journalists saying, 'Hey, what should I do?' " said (St. Louis **Post-Dispatch**, 6-4-78) Richard Schmidt, general counsel for the American Society of Newspaper Editors. "No newspaper reporter or editor now feels safe."

In criticizing the decision, journalists raised a great variety of concerns. Floyd Abrams, a lawyer who has argued many First Amendment cases before the Supreme Court, worried (New York **Times**, 6-2-78) that laws designed to help a journalist shield his sources would have no meaning in the face of surprise police searches. Harassment was the main concern of Keith Fuller, president and general manager of the Associated Press, who said (Kansas City **Times**, 6-1-78) officials irritated over news coverage might use search warrants against the offending media. "My concern about that **Zurcher v. Stanford** decision," said another writer, "is that I not only see a decision, I see a trend." And that trend, he wrote, is toward making the media more accessible to the law enforcement process.[15]

One of the concerns raised most frequently by journalists was that police would come to view newsrooms as places to routinely get information. Joseph Pulitzer Jr., editor and publisher of the St. Louis **Post-Dispatch**, expressed this view when he said:

> In permitting the police to arm themselves with warrants and make surprise raids on newspaper offices, the Supreme Court has in effect made the press a vehicle for police investigations and has gravely jeopardized its intended role of being an independent watchdog of the police and other governmental agencies.[16]

The Supreme Court's caution to apply warrant requirements with "particular exactitude" in media searches might prevent the danger that Pulitzer and others saw looming ahead. But some journalists were not convinced that the court's cautions were sufficient. As Nat Hentoff wrote:

> Although the High Court said that search warrants would be issued carefully and narrowly, the fact — as any criminal lawyer or police reporter knows — is that the vast majority of magistrates are as likely to refuse a request for a warrant as they are to decline an appointment to a higher judicial post.[17]

Another major fear expressed by journalists was that sources would be less willing to cooperate if they knew their identities could be revealed in police searches. On a small scale, this has already happened at the Stanford **Daily**. As one **Daily** staffer recalled in an affidavit, the very day after the search photographers trying to take pictures of another demonstration were harassed and threatened by protestors.[18] On a larger scale, the threat to confidential sources would be much more serious if, for example, the option to have a newspaper searched had been available when Richard Nixon was president. That threat is not altogether hypothetical, if one recalls the White House transcripts in which Nixon vowed to "get" the people who were against him. And as Sen. Charles Mathias, R-Md., pointed out (New York **Times**, 6-25-78), police officers searching the offices of the Washington **Post** several years ago might well have found

memos, phone numbers or other clues to identify the anonymous tipster Deep Throat. "And if Deep Throat knew that," Mathias said, "he probably never would have spoken."

A different concern raised by journalists is that reporters might begin destroying notes to prevent their falling into the hands of the police. In at least one place this has already occurred. The chief of the state bureau of Lee Newspapers in Helena, Mont. — where a media search was executed — said the bureau had destroyed or removed all records that might identify confidential sources. It was that type of policy, however, that got the Stanford **Daily** in trouble. In arguments before the Supreme Court, the prosecution cited the **Daily**'s policy of destroying photographs as part of the reason for issuing a search warrant rather than a subpoena.[19] A policy of destroying notes raises further problems in that the notes may be needed for accuracy checks or as defense in a libel suit. As Jack Landau, director of the Reporters Committee for Freedom of the Press, said (Kansas City **Times**, 6-1-78), "The best friends a reporter has when he is sued for libel are his notes."

Other results from the Stanford decision that journalists fear are that newspaper searches will cause physical disruption in the newsroom; that the press will begin censoring itself to conceal information the police might want; and that the processing of news will be "chilled" by the prospect of having internal editorial deliberations disclosed.

While the issues raised by journalists are certainly worthy of consideration, some have criticized the press for the shrillness of its claims. And some have said that the uproar over the Stanford decision may actually hurt the press, rather than help it. As Anthony Lewis wrote (New York **Times**, 6-8-78), "If you tell the police that they have a blunderbuss weapon, they may well believe it." Instead of crying havoc, Lewis said, the press might have been wiser to emphasize the helpful cautions to prosecutors and magistrates outlined in Justice White's opinion.

A similar caution not to overreact came from Professor Gerald Gunther of the Stanford Law School:

> The press may create a self-fulfilling prophecy if it proclaims this a total defeat for First Amendment values. It is not. The meaning of this case is going to be determined in ex parte hearings before magistrates. . . . It is clear to me that under this decision, a conscientious magistrate is obligated to be especially reluctant to issue search warrants when the press is involved.[20]

In a somewhat different vein, Bob Woodward of the Washington **Post** noted that while the press is busy calling the police a bully, there is an "intense perception" in the Supreme Court that the press itself is the big guy, the bully. The press probably is the big guy, Woodward said, and he called on journalists to deal with their power and address the problem of "resource allocation" — deciding which stories get covered and how thoroughly. If the press does not police itself, he added, "then someone else will, and the U.S. Supreme Court is poised and anxious to do so."[21]

'Countless Law Abiding Citizens'

In scrambling to protect their own interests, many journalists have neglected the "countless law abiding citizens" noted in Justice Stevens' dissent: the doctors, lawyers, priests and lay persons who may also be subjected to searches as innocent third parties who may possess evidence of a crime. Though these groups may not be as vocal as the press, their claims are no less legitimate. And in the deliberations now going on about legislation to offset the Stanford ruling, many of these groups are asking to be included.

In considering the threat to third parties other than the press, the search of a psychiatrist's office at Stanford University is particularly worth noting. Undertaken shortly after the newspaper search, the search of the psychiatrist's office was conducted with a warrant obtained by the same district attorney. According to Dr. Maurice Grossman of the Stanford University School of Medicine, in the hospital search police were looking (St. Louis **Post-Dispatch**, 9-3-78) for the records of a patient who had complained to police of a homosexual attack. The attack was the reason he had been referred for psychiatric care, and he had come to the hospital only once. In searching for the man's file, the police went through many patients' files and were stopped only when hospital officials pointed out that they had no other records on the man and were not opposing the records' release. There had been no attempt to get the records by means other than a search, although all the district attorney needed was the patient's approval to do so.

This case was presented as an adjunct to the Stanford **Daily** case when it went on appeal, but it later was dropped because attorneys felt it would detract from the First Amendment concerns. As Dr. Grossman concluded:

> My point is that the issue is broader than the news media's rights, as firm as they might be. . . . In this case the violation of psychiatric patients' rights was even more flagrant than the violation of the newspaper office. I am alarmed that the news media react with tunnel vision and are not concerned with the broader issue that is the neglect of the Bill of Rights affecting all.

As a further indication of the threat to psychiatrists, several writers have recalled the burglarizing of the office of Daniel Ellsberg's psychiatrist, pointing out that a warrant now obtainable would have made that invasion lawful.[22]

Like psychiatrists, attorneys also have been alarmed by the implications of the Stanford ruling. They point, for example, to the county prosecutor in California who asked an attorney for a document given him by a client, who was then under indictment. When the attorney-client privilege was claimed, the prosecutor obtained a warrant and ransacked the lawyer's office — legally. The document was found only after police looked through many files containing confidential information on other clients.[23]

A perhaps more ominous note for attorneys was sounded (St. Louis **Post-Dispatch**, 8-28-78) in the August issue of the **American Bar Association Journal**. An article in that issue suggested that lawyers — particularly criminal defense lawyers — may soon need to give clients "Stanford warnings": cautions that information given in confidence may be examined and seized by police.

Another group expressing concern over the Stanford ruling is the Authors League of America. In a letter to key members of Congress, the group urged that legislation protecting the press from searches be extended to protect authors and publishers of books and magazine articles. These authors, the letter said, have done much of the important investigative reporting on crucial issues.[24]

With groups such as these clamoring for legislative protection, it has become increasingly clear that the press has little right to expect exclusive protection. As Anthony Lewis wrote (New York **Times**, 6-8-78), "The claim of press exceptional-

ism is not only dubious as a matter of history or language; it is evidently unpersuasive in the Supreme Court." Similarly, Edward O. Delaney, counsel for Investigative Reporters and Editors, Inc., warned against requests for special press treatment, saying, "We are not the darlings of the public, nor should we be." And on the legislative side, New York Assemblyman Richard N. Gottfried argued that passing a bill protecting the press — probably the "most vocal element" of the threatened — might make impossible the passage of a bill providing protection for all. "Half a loaf, in this instance," he said, "may not be better than none."[25]

In a more unusual argument, Tom Wicker pointed out (New York **Times**, 6-27-78) some of the problems associated with special legislation for the press. Such legislation, he said, would obviously require that the press be defined — an act that in itself has "serious First Amendment implications," for any person not included in the definition for one purpose might later be excluded for other purposes. As examples of borderline cases, Wicker noted the "college professor investigating food prices for a monograph on ghetto living conditions" or "two people with a mimeograph putting out bulletins of opposition to a freeway planned near their neighborhood."

On the opposite side are those who argue that legislation protecting all third parties is simply impractical. Assistant Attorney General Philip Heymann has said, for example, that protection for all third parties raises difficult constitutional questions, and it might lead to sanctuaries where criminals could hide evidence by giving it to friends or relatives. He urged that press protections be enacted soon — because the threat is so great — while a continuing study is made of the more difficult third-party issue.[26]

Taking another angle, there are some who argue that no legislation should be enacted at all. Among this group is Eugene Patterson of the St. Petersburg **Times**, who urges that the First Amendment be taken as an absolute. "I'm convinced," he wrote, "that any law Congress can write would diminish the First Amendment."[27]

Finally, there are some — the eternal pessimists — who point out that no solution is permanent. As William J. Small of CBS News observed (New York **Times**, 6-27-78), whatever answers Congress arrives at, "a future Congress, in a different atmosphere, can undo your work."

Legislators Join the Fray

While the debate rages about the effects of the Stanford ruling and possible remedies for it, legislators have meanwhile been stirring up a flurry of bills. Some 13 bills were introduced in the last session of the U.S. Congress, eight of which protected all persons and five of which protected only the press. None of the bills was enacted, and since the new congressional session began in January, only a handful have been reintroduced.

The key point in most of the bills proposed in both sessions is to require police to obtain materials through subpoenas, rather than search warrants. The distinction is a crucial one, for a subpoena supplies advance notice of a request for documents, giving a person the opportunity to contest the request in court. Too, compliance with a subpoena means handing over only certain specified materials. A search warrant, by contrast, allows police to appear with no advance warning and to search desks and files on their own. This means that police may read or seize more documents than would be allowed with a subpoena.

The requirement of using a subpoena rather than a search warrant is a component of the Privacy Protection Amendment, the bill that gathered the most support in the last congressional term. Introduced by Sen. Birch Bayh, D-Ind., who is chairman of the Senate Judiciary Committee, the bill would have served as an amendment to the Civil Rights Act. It covered both federal and state law enforcement officials, and required that they obtain a subpoena in going after evidence held by any innocent third party. The plan allowed search warrants to be used if the third party were suspected of involvement in a crime, or if there were a danger that materials would be destroyed if advance notice were given.[28] Bayh has not reintroduced the measure this session, but an identical bill was introduced by Sen. Gaylord Nelson, D-Wisc. Bayh himself is working with the Justice Department, trying to broaden the administration's draft to protect other third parties besides the press.[29]

Also in this term, Senator Mathias has introduced the Third Party Privacy Act of 1979. Like Bayh's plan, this bill would protect all innocent third parties, requiring that subpoenas be used except in extraordinary circumstances — for example, where there is reason to believe the evidence sought would be destroyed. A unique part of the Mathias plan is that, unlike earlier proposals that allowed only the offending officer to be sued, this bill provides that both the officer and the government entity employing him or her could be sued for damages.[30]

A bill to protect only the press has been reintroduced this term by Rep. Robert Drinan, D-Mass., a former dean of the Boston College Law School. His plan would make it unlawful for police to search or seize "any things in the possession, custody or control of any person engaged in the gathering or dissemination of news" without obtaining a subpoena.[31]

Of all of the proposals circulating on Capitol Hill, however, the one now gaining the most attention is Carter's plan to protect the "work product" of any person possessing materials intended for publication. First proposed in December last year, the plan is one of a package of bills that on April 2 Carter urged Congress to enact. As many have pointed out, the plan represents a major shift for the administration, since the Justice Department supported the police with an amicus brief in the Stanford case.

Instead of attempting to define the "press," the president's plan specifies (New York **Times**, 4-3-79) the materials to be searched for. Thus, the plan prohibits surprise searches for the work products of newsmen, scholars, novelists and others who disseminate information to the public. Included in the work product category are notes, photos, tapes, interview files, drafts or other documents created in connection with a work to be published. Exceptions would be made only when the person having the material is suspected of a crime or in "life-endangering situations" involving documents such as ransom notes.

Looking for ways to broaden the proposal, the Justice Department began work several months ago on a plan to protect doctors and lawyers, as well as the press. The procedure would be much the same as in the work product proposal — prohibiting searches for certain materials, rather than places. It is not expected, however, that the plan will be broadened to protect all citizens, for as a Justice Department attorney said, "this is not a Fourth Amendment matter. The Supreme Court already decided that in the **Zurcher** case."[32]

On the state level, meanwhile, another batch of post-Stanford proposals have been made. And as some industry observers have noted, the state decisions may be the crucial ones, for it is questionable whether the federal government can legislate how local officials conduct their business.[33]

The first state to have already enacted a proposal is California, where the state shield law was amended to say no warrants shall be issued for any items described in that law. Exceptions will be made only when the property sought has been stolen, has been used in committing a crime, or is in the possession of someone who has committed or is about to commit a felony.[34]

In Connecticut, a bill to prevent police searches of newsrooms has been signed into law by Gov. Elia Grasso.[35] The measure requires (Boston **Globe**, 3-15-79) that police use subpoenas unless a reporter or media organization is suspected of committing a crime.

In Virginia, a bill to limit police searches of newsrooms has been withdrawn at the request of the Virginia Press Association, which said the measure would have done more harm than good. The association said the exceptions under which warrants could be issued were too broad and actually served as a "how-to" guide on obtaining search warrants against the media.

Other legislation to protect only the press has been proposed in Illinois, Massachusetts, Nevada, Ohio, Oregon, Pennsylvania and West Virginia. Legislation to provide more general protection is being considered in Michigan, Nebraska and Washington. Several other states had legislation pending last year that has not been reintroduced.[36]

How to Argue With a Search Warrant

Until legislation of some form or another is passed — if it ever is — journalists still fear the knock on the door that means a search warrant has arrived. To protect themselves against that eventuality, some newspapers and media groups have drawn up guidelines on how to deal with a search warrant. In the succinct words of Robert Shaw, manager of the Minnesota Newspaper Association, those guidelines usually boil down to two cautions: "delay and scream."[37] It seems to be good advice, for if the people being served with a warrant can delay long enough, and scream loud enough for a lawyer or judge, they may get into court to contest the warrant before it is executed. And getting into court is the key, for one cannot forcibly resist a search warrant without inviting arrest or a contempt citation.

In the half-dozen or so sets of guidelines that have come through the Freedom of Information Center, there are slight variations on the delay-and-scream method. But most of the guidelines are fairly similar to the ones prepared by John R. Finnegan, executive editor of the St. Paul **Dispatch and Pioneer Press**. Although Finnegan prepared these for his own newspaper, he says they can be used as a model by other newspapers. He does, however, encourage journalists to consider their own state's laws before adopting any guidelines.

> —When the police arrive with the warrant, insist that it be presented to the editor in charge. Stall as long as possible and have someone call your attorney immediately. If your state has a shield law, argue that it is being violated. There may be time gained which could allow time to start action to quash.
>
> —You can't stall forever, but you should take enough time to be sure that you understand what the warrant says. It should be specific about the area to be searched and the specific materials sought for examination. Have the officers involved explain it thoroughly to you. Be sure they know what the specific terms of the warrant are.
>
> —Insist that the officers restrict themselves precisely to what is called for in the warrant. Do not let them expand the area of the search or the materials to be seized.
>
> —Have a safe or security cabinet installed in your newsroom if you don't have one; place all of the staff's confidential notes, films, etc., in it. If only one individual has access to this, so much the better. Keep access minimal. Police may search locked desks, safes, etc., but if they insist on access, it will delay things if there are few people who have the key or the combination.
>
> —You can urge that your staff keep confidential notes and films at home, but homes can be searched, too.
>
> —Urge staffers to use code names for any confidential news sources. Don't use real names or initials on such notes. If your staffers can code their notes so that only they can read them, so much the better.
>
> —Don't throw notes away. You may need them for reference in libel actions or in verifying stories.
>
> —Photos are more difficult to handle. We prefer to destroy photos of confrontations, accidents, etc. that we do not publish. Removal of such material from the files should be done immediately after the decision not to print is made. You will not be violating any court order if you do so. Unfortunately, of course, this action means that many photos which could have historical value in later years will be lost.
>
> —Cover the incident in your newsroom complete with photos. The publicity might discourage a second visit.[38]

Although these guidelines are fairly comprehensive, an additional suggestion offered by the **UPI Reporter** is that journalists make an effort to educate local officials about their views on newspaper searches. It may be helpful, the publication said, to remind officials of the Supreme Court's admonition to apply warrant requirements with exactitude in the First Amendment area. Too, journalists might point out their preference for subpoenas, as well as their determination to challenge arguably invalid search warrants.[39]

From the **Maine Press Association Bulletin** comes the additional advice to let no one leave the building or remove any property once a warrant has been served, for doing so might invite arrest or a charge of contempt. The **Bulletin** also notes that the newspaper is entitled to a receipt for each item taken.[40]

While these are general principles on which some newspapers have based guidelines, other newspapers have chosen to put nothing down in writing. The New York **Times** has made (phone call, 4-3-79) such a decision, as has (phone call, 4-2-79) the Los Angeles **Times**. The Washington **Post** also reports (phone call, 4-4-79) that it has no written guidelines, and the reason, according to attorney Christopher Little, is that the paper does not want officials conducting a search to know the staff's strategy beforehand.

Next: An Epidemic of Search Warrants?

With guidelines in hand, and legislation perhaps on the way, journalists' fears about surprise police searches may abate somewhat. But there is only so much defensive work that can be done. What remains to be seen is how law-enforcement of-

ficials themselves will react to the Stanford ruling.

On the federal level, the indications from Attorney General Griffin Bell have been positive. He has ordered that department regulations requiring his approval for subpoenas of reporters be enlarged to include search warrants. As the regulations on subpoenas now stand, they require that all reasonable means to obtain evidence from non-media sources must first be exhausted. If it is clear that only the press can give the information, federal prosecutors must attempt to negotiate with the media before issuing a subpoena.[41] While these regulations do not apply to local law enforcement, Deputy Attorney General Benjamin Civiletti has said, "We do set a tone and have some influence in that area."[42]

In Connecticut, similar guidelines on media searches have been established by U.S. Attorney Richard Blumenthal. According to his guidelines, "all reasonable attempts" must be made to obtain evidence from non-media sources. Failing that, the media must be encouraged to disclose the material voluntarily. If a search warrant is to be used, the evidence sought must be essential to a successful investigation, and there must be reasonable grounds for believing the evidence is in danger of being destroyed.[43]

Taking the inquiry to the local level — to the district attorneys and police officers who actually conduct searches — the indications seem to be mixed. Bill Ellingsworth, speaking for the International Association of Police Chiefs, said (Kansas City **Times**, 6-1-78) the dangers of police searches have been overestimated. "Police are not going to stage wholesale raids on newsrooms around the country," he said. "I don't think it is as sinister as it may appear to people."

It may be, however, that district attorneys will disagree with that statement — if the action of the National District Attorneys' Association is any indication. That group, whose members include three-quarters of the local and state prosecutors in the nation, filed (St. Louis **Post-Dispatch**, 6-4-78) an amicus brief urging that limits to third-party searches be removed. And the Washington counsel for the group told a Senate subcommittee that his organization opposes legislation to limit prosecutors' power to use search warrants.

With such varying indications as these, it is difficult to predict whether search warrants will increase in the future. But the facts of the matter are that searches **already** are on the increase. According to Jack Landau of the Reporters Committee for Freedom of the Press, there have been (Kansas City **Times**, 7-14-78) 15 search warrants issued against the media since 1970 — 13 obtained by state officials and two by the FBI. All but two of those searches took place in California.

The attorney general's office gets a slightly different count. Assistant Attorney General Philip Heymann has testified (New York **Times**, 6-25-78) that no federal law-enforcement agency has ever conducted a newsroom search and that since 1970 only 12 warrants for press searches have been issued — 10 in California, and four of those related to Patty Hearst and the Symbionese Liberation Army.

Tom Wicker offered (New York **Times**, 6-25-78) an interesting comment on that count:

> There are two ways to look at that record. Only 12 searches in 203 years of the Republic sounds not too bad; but what about no searches for 195 years, then 12 in the last eight, and three within the last year? Besides, as Senator Bayh asked Mr. Heymann, since the Stanford **Daily** decision on May 31, "might we not be now in a new ball game?" And Mr. Heymann agreed that the Supreme Court decision might "look like an invitation" to conduct police searches of newsrooms.

Even if the numbers themselves are not threatening, the circumstances of some of the past searches are, for they indicate that journalists' worst fears have begun to materialize.

Concerning the physical disruption of newsrooms, it is worth noting that a search of a radio station in Los Angeles lasted eight hours. But even more frightening is another search that lasted nearly 20 hours. It occurred several years ago and was undertaken by 134 FBI agents who came to the offices of the **Freedom News Journal**, a publication of the Church of Scientology. According to a **Journal** staff member, the agents were searching for what were alleged to be illegally obtained government documents: They took almost 100,000 pages of material, most of which was subsequently found to be somewhat innocuous. When the case later went to court, a federal district judge ruled that the raid had been conducted legally and within the bounds set by the Supreme Court in the Stanford case. As the **Journal** staff member concluded, "If the case is not reversed on the appellate level it may require a search warrant to find the First Amendment."[44]

Also concerning physical disruption, one might note that Los Angeles police in 1974 searched the Los Angeles **Star**, seizing printing plates and files as part of a libel prosecution against the paper.[45]

On the question of confidential sources — whether searches will cause them to dry up — one case merits particular attention. According to testimony given in a congressional hearing by the executive editor of the Boston **Globe**, the religion editor of the **Globe** was once approached by a confidential source who initially appeared willing to provide information. The source broke off contact, however, because he feared the police could learn his identity through a search.[46]

Perhaps the final question remaining is whether or not police will come to view newsrooms as places to routinely get information. Noted constitutional lawyer Floyd Abrams has commented that if police do come to see newsrooms in this light, the Stanford decision will have a more chilling effect than any previous case. "Then," he added, "it will be a different kind of country from the one the First Amendment was designed to preserve."[47]

FOOTNOTES

1. Lenora Williamson, "Newspaper editors rap high court search ruling," **Editor & Publisher**, 17 June 1978, p. 14.
2. **Ibid.**, p. 9.
3. **The United States Law Week**, 30 May 1978, pp. 4546-47.
4. **Ibid.**
5. Halina J. Czernielewski, "The Specter from Stanford: Your Newsroom May Be Searched," **Quill**, July-August 1978, p. 21.
6. **Ibid.**, pp. 21-22.
7. In the majority were the four Supreme Court justices named by Nixon — Warren Burger, Harry Blackmun, Lewis Powell Jr. and William Rehnquist — joined by Byron White, a Kennedy appointee. Dissenting were Thurgood Marshall, Potter Stewart and John P. Stevens. William J. Brennan did not participate.
8. 3 **Med. L. Rptr.** 2377.
9. **Ibid.** at 2380.
10. **Ibid.** at 2384.
11. **Ibid.**
12. **Ibid.** at 2385.
13. **Ibid.** at 2387.
14. **Ibid.** at 2390.
15. "Coleman shares ideas on FOI with press," **Virginia's Press**, August 1978, p. 7.
16. Williamson, p. 9.
17. Nat Hentoff, "Privacy for writers and doctors only?" **Inquiry**, 19 February 1979, p. 5.
18. Czernielewski, p. 24.
19. **Ibid.**, p. 25.

20. **Ibid.**, p. 24.
21. "News Notes," **Media Law Reporter**, 20 March 1979.
22. Hentoff, p. 6.
23. **Ibid.**, p. 7.
24. Susan Wagner, "Authors League Asks Laws to Protect Against Searches," **Publishers Weekly**, 31 July 1978, p. 18.
25. "News Notes," **Media Law Reporter**, 27 February 1979.
26. **Ibid.**
27. Eugene Patterson, "Search warrants: Which threat?" **ASNE Bulletin**, October 1978, p. 5.
28. Hentoff, p. 6.
29. "News Notes," **Media Law Reporter**, 27 February 1979.
30. I. William Hill, "Introduce search legislation to protect news personnel," **Editor & Publisher**, 10 February 1979, p. 48.
31. **Ibid.**
32. Hentoff, p. 6.
33. "Stanford Ruling Brings Reaction on State Levels, High Court Petitioned for Rehearing," **SNPA Bulletin-News**, 31 July 1978, p. 3.
34. "News Notes," **Media Law Reporter**, 27 February 1979.
35. "News search bill signed into law," **Editor & Publisher**, 14 April 1979, p. 51.
36. "News Notes," **Media Law Reporter**, 27 February 1979.
37. **Minnesota Newspaper Association Bulletin**, 7 June 1978, p. 2.
38. "Minnesota Editor Constructs Guidelines to Deal With Police Search of Newsroom," **SNPA Bulletin-News**, 14 August 1978, pp. 3-4.
39. "Search Guidelines Issued to UPI Bureaus," **UPI Reporter**, 2 November 1978, p. 2.
40. "Issues of Law," **Maine Press Association Bulletin**, September 1978, pp. 5-6.
41. "Justice Department Guidelines Underway to Hold Down Searches of Media Offices," **Access Reports**, 11 July 1978, p. 11.
42. Czerniejewski, p. 25.
43. "Prosecutors set tight searc.. guidelines," **Publishers' Auxiliary**, 25 September 1978, p. 15.
44. Gregory Taylor, "Searching for the 1st Amendment," **Publishers' Auxiliary**, 30 October 1978, p. 9.
45. Czerniejewski, p. 23.
46. Robert Drinan, "A Bill to Protect the Press," **The Nation**, 5-12 August 1978, p. 102.
47. "A Right to Rummage," **Time**, 12 June 1978, p. 101.